

IN RE NEW WATERBURY, LTD.

TSCA Appeal No. 93-2

REMAND ORDER

Decided October 20, 1994

Syllabus

U.S. EPA, Region I, appeals the decision of a presiding officer to reopen a hearing and rescind a \$35,750 penalty assessed against New Waterbury, Ltd. ("New Waterbury"), for undisputed violations arising under § 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e). The presiding officer had originally assessed a \$35,750 penalty but rescinded the penalty after reopening the hearing on the grounds that the Region had not rebutted New Waterbury's "showing" that it did not have the resources or ability to pay *any* penalty. The Region argues that the presiding officer's decision to rescind the entire penalty is flawed in three respects. First, the Region asserts that the presiding officer erred in placing the burden of proof on New Waterbury's ability to pay a civil penalty on the Region. Second, the Region asserts that the presiding officer erred in reopening the hearing to allow for more fact-finding into New Waterbury's ability to pay the assessed penalty. Finally, the Region argues, the presiding officer erred in rescinding the penalty because even if the Region bears the burden of proof on "ability to pay," the Region met its burden by demonstrating that New Waterbury could obtain the funds necessary to pay a penalty from other entities related to and involved in New Waterbury's enterprise.

Held: The Board concludes that:

1.The presiding officer properly concluded that the Region bears the burden of proof regarding the "appropriateness" of a penalty considering all of the listed factors under TSCA, including a respondent's ability to pay.

2.The presiding officer did not err in reopening the hearing to allow for more evidence on New Waterbury's ability to pay.

3.The presiding officer did err in rescinding the entire penalty based upon New Waterbury's ability to pay. The Board finds based upon its review of the entire record that the Region met its burden of persuasion regarding the appropriateness of a penalty and the Board assesses a penalty of \$24,000 for New Waterbury's undisputed TSCA violations.

***Before Environmental Appeals Judges Nancy B. Firestone,
Ronald L. McCallum, and Edward E. Reich.***

Opinion of the Board by Judge Firestone:

U.S. EPA, Region I, appeals the decision of a presiding officer to reopen a hearing and rescind a \$35,750 penalty assessed against New